

Peter E. Hess, [6 O.R.W. 720a \(1992\)](#).

Location: Monitor National Marine Sanctuary

Applicable Law: [National Marine Sanctuaries Act](#) (NMSA) ([16 U.S.C. §§ 1431, et seq.](#))

Where Law Applies: *National Marine Sanctuaries Act:* The NMSA applies in national marine sanctuaries designated by Congress or the Secretary of Commerce. These sanctuaries must be areas of special national significance in the marine environment, which includes coastal and ocean waters, as well as the Great Lakes and their connecting waters. The seaward limit of the NMSA is the 200 nautical mile exclusive economic zone (EEZ) and continental shelf.

Holding:

- 1) The Administrative Law Judge recommended that the action denying the issuance of the permit be sustained and the appeal of such action be denied because the permit application was inadequate on its face and as a result did not constitute a valid scientific research permit.
- 2) In order for the permitting agency to properly assess an application to conduct scientific research in the Monitor National Marine Sanctuary, the proposal must contain a systematic scientific research plan that specifies the research objectives and employs a suitable methodology consistent with such objectives.
- 3) The appeal process under the National Marine Sanctuary Program Regulations may not be used to supplement, modify, amend, or perfect an application to conduct research in the Monitor National Marine Sanctuary.

Background:

In 1990, the Administrative Law Judge (ALJ) in the case *Gary Gentile*, [6 O.R.W. 285c \(1990\)](#) recommended upholding NOAA's requirement that physical access to the U.S.S. *Monitor* be conditioned upon the permittee conducting scientific research. Shortly thereafter, another challenge was brought against NOAA's permitting system with this case, *Peter E. Hess*, [6 O.R.W. 720a \(1992\)](#). The ALJ in this case, William Ogden, went one step further than *Gentile* and recommended upholding NOAA's requirement that a proposal to conduct scientific research contain adequate detailed information, including a research objective, plan, design, and an explanation of the scientific methodology to be employed.

General Facts:

A Notice in the Federal Register on February 20, 1991, requested research proposals for studies in the Monitor National Marine Sanctuary (MNMS or Sanctuary) and stated that guidelines for research topics could be found in the Sanctuary Management Plan. In response, on April 4, 1991, Peter E. Hess (appellant) submitted a permit application to conduct research related to the MNMS. By letter dated July 23, 1991, the permitting agency, the National Oceanic and Atmospheric Administration (NOAA), advised Hess that the application was not acceptable as

presented and offered technical assistance to modify the application. The appellant considered the letter a denial of his application and requested an administrative hearing, pursuant to the Regulations governing the MNMS which state, “[A]ny person may appeal the granting, denial, conditioning, or suspension of any permit . . . to the Administrator of NOAA,” and may request an informal hearing. (15 C.F.R. § 924.8(c)). After it was apparent that Hess did not intend to modify his application, the agency denied the permit request by letter on November 22, 1991, and stated that the applicant’s recent requests for a hearing were timely filed.

This appeal before an Administrative Law Judge (ALJ) followed, regarding whether the application was properly considered and evaluated by NOAA according to the criteria and factors set forth in the Regulations (15 C.F.R. § 924.6(b)).

Procedural Posture:

On February 13, 1992, the ALJ held a hearing on the denial of the application. On March 11, 1992, the ALJ issued a Recommended Decision that NOAA’s decision to deny the application be upheld because the application was inadequate on its face and did not constitute a valid research permit. Pursuant to 15 C.F.R. § 924.8(c), the ALJ forwarded the Recommended Decision to the NOAA’s Administrator. On March 24, 1992, Hess filed “Exceptions to the Recommended Decision” with the Administrator’s office, to which the agency’s counsel responded. The Regulations provided that the Administrator may either adopt the ALJ’s Recommended Decision, in whole or in part, or may reject or modify it. The Secretarial delegate, the Deputy Assistant Administrator, adopted the ALJ’s Recommended Decision to deny the permit application. This decision constituted a final agency action for purposes of the Administrative Procedure Act.

Court Holding and Reasoning:

The Hess application contained a proposal to conduct research in archaeological studies, corrosion studies, and the effects of Hurricane Lilly on the wreck site. In regards to the archaeological studies, the application did not contain a scientific plan specifying the research objectives and methodology, and Hess did not amend specific areas of the application when given the opportunity to do so by NOAA. At the hearing, the appellant’s witness stated the plan would come after the permit was approved. The ALJ determined that it is not possible for the agency to issue a permit without having such a plan for review, and to argue that this detail is not necessary to make a permit determination “is without merit.” With regards to the corrosion studies, the hearing testimony discussed research methodology, but that information was not put forth in the application and, accordingly, the application did not contain a complete research explanation. The hurricane aspects of the application did not set forth the type of research to be performed or indicate the expertise necessary to conduct such research.

The ALJ recommended that the action denying the issuance of the permit be sustained and the appeal of such action be denied. The application was inadequate on its face, being deficient in specifying a detailed design, the scope of work, and methodology. In order for NOAA to properly assess an application to conduct research in the Sanctuary, the proposal must contain a systematic scientific plan of research which specifies research objectives and employs a suitable

methodology consistent with the objectives of the project. The appellant ignored the opportunity to clarify and revise his research proposal before its denial. The appeal process under the Regulations may not be used to supplement, modify, amend, or perfect an application to conduct research in the Sanctuary.